FEATURE ARTICLE

Near Extinction: California's Protection of Endangered Species

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I. INTRODUCTION

In 1984, the state legislature enacted the California Endangered Species Act (CESA).[1] In recognition of the state's unique natural diversity and the runaway population growth which threatens to destroy it, CESA's primary purpose is to afford protection to animal and plant species whose populations and/or habitats have so seriously declined that their very survival is called into question. Under CESA since 1984, the state Fish and Game Commission (FGC)—usually upon the recommendation of the Department of Fish and Game (DFG)—has studied, recognized, and "listed" as threatened or endangered 71 animals and 140 plants.[2] This listing entitles those species to certain protections from governmental and private incursions.

In an era when excessive governmental regulation lacking traditional justification flourishes, CESA's purpose is particularly defensible. It seeks to prevent the ultimate irreparable harm: the forever-irreversible extinction of a California species. It is not absolute; it bends—perhaps overly so—to the needs of a 30,000,000-citizen state. At best, it is a modest attempt to balance the developer's pocketbook with the conservationist's zeal; it simply requires—in theory—the state (and those who must secure permission from the state to build or develop) to step back, think, and perhaps to seek alternatives to minimize adverse effects on species in danger of extinction.

But CESA doesn't work. In its latest report on the status of species as endangered or threatened, DFG acknowledged that 71% of the *listed* plant and animal species—that is, those which have already passed through the lengthy and arduous listing process— are further declining[3] DFG also acknowledged 650 *unlisted* species which, in the words of DFG, "could presently meet the criteria for listing" but have not yet been formally addressed by FGC and DFG.[4] These species lack the prospect of timely palliatives to slow their possible descent to extinction.

Despite the wide-ranging effects of CESA, very little has been written about it. No appellate court decisions have interpreted the Act,[5] and no legal articles on either the Act or its implications have been published. This article examines CESA and its demonstrated deficiencies: it is too cumbersome and restrictive for developers; it is too difficult and expensive for environmentalists; the state lacks the money and the will to resource it properly; the agencies responsible for enforcing it lack authority, resources, and commitment, and are hampered by structural and political impediments; and it is too lengthy for endangered plant and animal species, which are literally dying out while waiting to be listed.

If it seeks to make good on the promise of CESA, the legislature should take a hard look at the language of the statute, the regulatory process it creates, the agencies responsible for implementing it, and its overall commitment to conserving and preserving California's fish, wildlife, and plants for future generations.

II. THE ACT

In enacting CESA, the legislature declared its intent that animals and plants threatened with extinction deserve and will receive protection by the state. The legislature's concerns are expressed within the Act itself:

> The Legislature hereby finds and declares all of the following:
>
> (a) Certain species of fish, wildlife, and plants have been rendered extinct as a consequence of man's activities, untempered by adequate concern and conservation.
>
> (b) Other species of fish, wildlife, and plants are in danger of, or are threatened with, extinction because their habitats are threatened with destruction, adverse modification, or severe curtailment, or because of overexploitation, disease, predation, or other factors.
>
> (c) These species of fish, wildlife, and plants are of ecological, educational, historical, recreational, aesthetic, economic, and scientific value to the people of this state, and the conservation, protection, and enhancement of these species and their habitat is of statewide concern.[6]

To carry out this intent, CESA sets forth a variety of mechanisms: (1) a listing procedure for the identification of species at risk; (2) a range of protections for listed species from harm caused by state-sponsored, funded, or approved projects;[7] and (3) a "consultation" requirement, whereby state agencies wishing to carry out projects which may adversely impact a listed species are required to consult with DFG to determine reasonable alternatives which will alleviate that impact, or mitigation and species enhancement measures if there is no reasonable alternative to the project as proposed. These mechanisms are described in detail below.

A. The Listing Procedure

1. Listing in the Normal Course. Article 2 of the Act specifies the process for listing a species.[8] The law allows FGC to grant one of two designations —threatened or endangered—to a particular species. As used in the statute, an "endangered" species is defined as:

> a native species or subspecies of bird, mammal, fish, amphibian, reptile, or plant which is in serious danger of becoming extinct throughout all, or a significant portion, of its range due to one or more causes, including loss of habitat, change in habitat, overexploitation, predation, competition, or disease.[9]

A "threatened" species is defined as:

> a native species or subspecies of a bird, mammal, fish, amphibian, reptile, or plant that, although not presently threatened with extinction, is likely to become an endangered species in the foreseeable future in the absence of the special protection and management efforts required by this chapter.[10]

CESA requires FGC to establish a list of both threatened and endangered species. It also authorizes the Commission to add or remove species from these lists

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if the best scientific information available to the Commission warrants such action.[11] The statute allows interested parties to petition the Commission to place a species on either list. Further, in the absence of a third party petition, DFG may propose the addition or deletion of a species.[12]

To be preliminarily accepted by FGC, a petition for listing must include sufficient scientific information to show that the proposed action "may be warranted."[13] The scientific data required to be contained in a listing petition includes information on the species' population trend; range, distribution, abundance, and life history of the species; factors affecting the ability of the population to survive and reproduce; the degree and immediacy of the threat; and the availability and sources of this scientific information.[14] Because listing a species as either threatened or endangered is both costly and potentially disruptive to state and private interests,[15] the legislature has imposed a heavy burden on petitioners to demonstrate that a proposed listing is warranted.

If a submitted petition contains all the specified scientific information, the Commission has ten days in which to refer it to DFG for evaluation.[16] The Department then has ninety days in which to evaluate the petition and make a recommendation as to whether the species deserves protective status, based on the information contained in the petition.[17] Following the ninety-day evaluation period, FGC must schedule the petition and DFG's recommendation for consideration at its next available public meeting.[18]

If DFG makes a positive recommendation and the Commission agrees, the petitioned species is then considered a "candidate".[19] This does not mean that the species has been listed; rather, "candidate" status is an interim step indicating that the Department is evaluating the status of this species to determine whether it warrants the permanent protections afforded through listing.[20]

Following FGC's preliminary acceptance of the petition and designation of the species as a "candidate", DFG has twelve months in which to review the status of the species and make a recommendation to FGC as to permanent listing. DFG must provide a written report to the Commission, "based upon the best scientific information available...which indicates whether the petitioned action is warranted, which includes a preliminary identification of the habitat that may be essential to the continued existence of the species, and which recommends management activities and other recommendations for recovery of the species."[21]

Following receipt of DFG's report and recommendation, FGC must schedule the petition for "final consideration" at its next available meeting.[22] At that meeting, the Commission must decide whether the petitioned action is warranted. It should be emphasized that the Commission's final decision on the petition is wholly discretionary. The statute sets forth no specific criteria which, if present, would require FGC to list a species. The statute only requires DFG to recommend and FGC to adopt "criteria for determining if a species is endangered or threatened."[23] However, nothing in either the statute or the applicable regulations[24] *requires* FGC to list a species under *any* circumstances.

If FGC finds that the proposed species deserves protection, it must then publish a notice of proposed rulemaking in the *California Regulatory Notice Register*, open the proposal to public comments for a minimum 45-day period, schedule an optional public hearing on the proposal, formally adopt the proposed listing at a public meeting, compile the administrative rulemaking record for review by the Office of Administrative Law (OAL), submit it to OAL, and await OAL's approval after a thirty-day review period.[25] If the Commission denies the petition or fails to act, the petitioner may seek judicial review through a petition for writ of mandate pursuant to Code of Civil Procedure section 1094.5.[26]

2. Emergency Listing. Aside from the normal petitioning procedure, CESA's Article 2 also allows FGC to immediately list a species on an urgency basis if it finds "that there is any emergency posing a significant threat to the continued existence" of a particular species.[27] Designed primarily as a safety valve, this authority permits emergency listing where exigent circumstances so justify. If a given species is endangered to the point of extinction and the normal rulemaking process will take too long, the Commission has the power to immediately list the species.[28] The listing is temporary in nature, and must be followed by rulemaking in order to confer permanent protection.

3. Periodic Review and Reporting. Article 2 also requires DFG to conduct a periodic review of all listed species to ensure they warrant continued protection. Each species is to be reviewed every five years to determine whether the conditions that resulted in the original listing are still present. This review shall include "identification of the habitat that may be essential to the continued existence of the species and the department's recommendations for management activities and other recommendations for recovery of the species."[29]

DFG is required to submit reports on its five-year review of each listed species to FGC.[30] If a five-year report includes a recommendation to add or remove a species from the list, the report is to be treated as a petition pursuant to section 2072.7 of the Code, thus triggering the one-year DFG formal evaluation period.[31]

By January 30 of each year, DFG is also required to submit to FGC, the legislature, the Governor, and the public an annual report summarizing the status of all state-listed endangered, threatened, and candidate species.[32]

B. Protections Afforded Listed Species

1. Prohibition on Taking. CESA's Article 3 sets forth several specific protections for listed species. Under the Act, no person may import into California, export from California, or take, possess, purchase, or sell within California any listed species (with specified exceptions).[33] This prohibition applies to any endangered, threatened, and—under certain conditions— candidate species.[34]

The Act also provides some protection for the "habitat essential to the continued existence" of listed species. State agencies are prohibited from approving projects which would "result in the destruction or adverse modification of a listed species' habitat."[35]

2. Consultations. The heart of CESA's protections lies in its "consultation" requirement. Once a species is listed by FGC, a state "lead agency"[36] (that is, the state agency which is carrying out a project, or which is primarily responsible for approving a project) must consult with DFG, in accordance with the guidelines developed by the Department,[37] "to ensure that any action authorized, funded, or carried out by that state lead agency is not likely to jeopardize the continued existence of any endangered or threatened species."[38] When a lead agency consults with DFG on a proposed project, the Department must "issue a written finding based on its determination of whether a proposed project would jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat essential to the continued existence of the species."[39]

CESA includes an unequivocal statement: "[a] state lead agency shall

not approve a project which would likely result in the extinction of any endangered species or threatened species."[40] However, short of that circumstance, state agencies may undertake projects which do result in harm to listed species, under specified conditions.

If, after consultation, DFG finds that a lead agency's proposed project would jeopardize a listed species, "the department shall determine and specify to the state lead agency reasonable and prudent alternatives consistent with conserving the species which would prevent jeopardy to the continued existence of the species or the destruction or adverse modification of the habitat essential to the continued existence of the species."[41]

The lead agency must incorporate these "reasonable and prudent alternatives" into the specifications for its proposed project,[42] *unless* "specific economic, social, or other conditions make infeasible the alternatives" prescribed by DFG.[43] In that case, the lead agency may proceed with its project if both of the following conditions are met: (1) the lead agency requires "reasonable mitigation and enhancement measures as are necessary and appropriate to minimize the adverse impacts of the project" upon the endangered or threatened species or its habitat; and (2) the lead agency finds both that the "benefits of the project as proposed clearly outweigh the benefits of the project were it to be carried out with the reasonable and prudent alternatives," and that it has not made "an irreversible or irretrievable commitment" of resources to the project after commencing consultation with DFG, which "has the effect of foreclosing the opportunity for formulating and implementing reasonable and prudent alternatives consistent with conserving the species...."[44]

Thus, while consultations with DFG are required, the lead agency may approve projects over Departmental objections, so long as there is no threat of extinction to a listed species, reasonable mitigation measures are included in the project, and the importance of the state activity as proposed outweighs the project as compromised through incorporation of alternatives aimed at preserving the species.

In spite of this limitation, the consultation requirement is critical because it attempts to institutionalize species and habitat preservation as a statewide goal with consistent application by a single responsible agency (DFG). Procedurally, it is crucial because it puts the burden of notice to and consultation with DFG on the state lead agency seeking to complete the project. Despite the importance of the consultation requirement to the purpose of CESA, it will sunset on January 1, 1994, unless the legislature acts to extend it.[45]

In 1989, 15 state lead agencies initiated 56 formal project consultations with DFG.[46] Of these consultations, no challenges to Department findings were made, and no consultations finalized in 1989 resulted in jeopardy findings.[47]

C. Recovery of Listed Species

The purpose of CESA is to ensure the survival of California's native plant and wildlife populations despite soaring population growth and unprecedented development throughout the state. While the Act offers protection to listed species, its ultimate goal is to ensure recovery of these groups to the point of viability.[48] The protections afforded by CESA and other more drastic restoration efforts have successfully halted or reversed dramatic declines in some California listed species.

One example is the California Bighorn Sheep. While the species remains listed by the state as threatened, careful management efforts have led to a substantial increase in its numbers. When the Bighorn Sheep was listed, it was estimated that its population consisted of 195 animals. Following the imposition of protection from poaching, reduced competition from domestic livestock, water development, and successful reintroduction programs, the Bighorn population increased to 327.[49] Although this species will never be as abundant as it once was, careful management has enabled the Bighorn to increase and securely occupy portions of its former range.[50]

Another notable example is the California Condor. The Condor once thrived within the state. However, due to killings by ranchers, pesticide use, and lead poisoning, the species declined to the edge of extinction. To prevent the complete loss of this species, federal and state officials were forced to remove these birds from the wild in 1987 and place them in captive breeding programs. Now, all known condors are in captivity in the Los Angeles and San Diego zoos. Through these programs, the birds have reproduced; the current population stands at 32 condors.[51] The return of the California Condor to the wild will not occur until at least 1992.[52]

DFG's 1989 Annual Report on the status of listed species states that several other endangered species, such as the bald eagle, peregrine falcon, and California brown pelican, are "on the road to recovery as their numbers have increased in response to active management programs and controls on pollutants."[53]

However, DFG/FGC critics chasten the two agencies for what they call "biological brinkmanship": in spite of overwhelming scientific evidence, DFG/FGC often refuse to act until a species is at the absolute verge of extinction.[54] As in the case of the condor, once the species is finally listed, DFG and FGC are then required to take (or recommend to lead agencies) far more costly and drastic measures than would have been required had the agencies acted earlier. These last-minute efforts are also less effective, because the species has been allowed to dwindle to the point where the gene pool has become biologically depleted.

Further, these isolated successes are overshadowed by the very disturbing "big picture" presented by DFG itself in its 1989 report: "**71% of the listed plant and animal species are declining.**"[55] The reason for this decline, says DFG, is the "destruction and degradation of endangered species habitat through a variety of direct and indirect human impacts."[56] Further, "[m]any of our endangered species survive as very small, fragmented populations in habitat degraded by human activities. Under such conditions, there is no certainty that they will survive for long."[57] Finally, DFG notes that 34 animal species and subspecies have already become extinct in California.[58] These facts, as admitted by DFG, indicate that a critical review of CESA, DFG, FGC, and California's commitment to preservation of its natural flora and fauna is long overdue.

III. THE EFFECTIVENESS OF CESA AND THE AGENCIES RESPONSIBLE FOR ENFORCING IT

DFG's own finding that 71% of *listed* species are declining— that is, species already recognized by the state as endangered or threatened and receiving the statute's substantive protections— is indicative of serious problems within the statute itself and within DFG and FGC, the entities responsible for implementing and enforcing CESA. A close look at the statute reveals that it is fraught with loopholes and weaknesses; in fact, the listing procedure created by the statute—rather than preventing the irreparable harm resulting from the complete extinction of a species—probably contributes to serious and costly decline through its sheer length. A criti-

cal appraisal of the structure and performance of DFG and FGC—several of which have been performed by other government agencies, task forces, and public interest groups in the past few years—reveals that major changes are needed if the legislature is truly serious about protection of California's endangered species.

A. CESA Is Weak and Filled With Loopholes

1. Delay. One of the most accepted and traditional justifications for the creation of regulatory mechanisms is the prevention of external costs, particularly irreparable harm, which would otherwise occur in the absence of regulation.[59] With its goal of preventing permanent extinction of native California species, CESA has a highly defensible theoretical justification.

However, the particular regulatory scheme created in CESA to accomplish its goal is self-defeating. The normal-course listing procedure and rulemaking proceeding together take a minimum of 644 days[60]—or one year and nine months *after* a serious threat to the species is already documentable and documented. This figure assumes that FGC meets promptly after receipt of DFG information (which is not always the case), that DFG is expeditious in preparing its rulemaking filings and record (which is not always the case), and that the Office of Administrative Law does not find fault with the rulemaking record.[61] This degree of built-in, required delay is inexcusable, especially where time is of the essence and irreparable harm is imminent. FGC's emergency listing procedure has the potential to ameliorate this weakness, but *it has never been used by FGC.*[62]

2. FGC Is Not Required To Act. As noted above, nothing in CESA requires the Commission to list a species under any circumstances. FGC's decisionmaking authority at all points in the listing process is wholly discretionary. Although the Department is required to rely on and present to the Commission "the best scientific information available,"[63] the statute sets forth no criteria or circumstances under which the Commission is required to list a species, and no requirement that it rely on that scientific information.

Further, although CESA requires FGC to adopt "criteria for determining if a species is endangered or threatened,"[64] the standards FGC has adopted for itself are none too specific. Under the California Code of Regulations, the Commission "shall" list a species "if the Commission determines that its continued existence is in serious danger or it is threatened by any one or any combination of the following factors: (1) present or threatened modification or destruction of its habitat; (2) overexploitation; (3) predation; (4) competition; (5) disease; or (6) other natural occurrences or human related activities.[65] None of these vague terms are further defined or quantified in any meaningful way. Moreover, in adopting this regulation, FGC has merely restated (almost verbatim) statutory language,[66] and has arguably adopted no listing criteria as directed by the legislature in the five years CESA has existed.

During the latter half of 1989, FGC rejected five petitions for listing, in the face of strong evidence presented by state biologists and other experts that the species were seriously threatened and that they would continue to deteriorate in the absence of government intervention. "The Commission rejected the five species in the absence of any testimony challenging the biological merits of listing and with no public discussion on the scant written arguments from scientists hired by the opposition."[67]

This grant of unbridled discretion and absence of mandatory criteria effectively insulates FGC listing decisions from judicial review. A listing decision is reviewable by a court under the "substantial evidence" test;[68] that is, the court must uphold FGC's listing decision if its findings are supported by substantial evidence in light of the whole record.[69] This limited judicial review allows no weighing of the evidence by the court; the court is not permitted to substitute its judgment for that of FGC. If a listing decision is ever challenged in court, the court will be reviewing the validity of FGC's decision without the benefit of any concrete, defined, or quantitative standards to guide the decisionmaking of FGC. In such cases, courts usually defer to and rarely overturn agencies.

3. CESA Allows Harm to Listed Species. Two key criticisms of this law are that it does not apply directly to anyone but the state (*e.g.*, CESA does not require local governments to consult with DFG when they wish to engage in a project which will impact a listed species),[70] and that it then permits the state to harm a listed species.[71] Many environmentalists would prefer stronger language which insulates listed species from harm. However, as one of the primary authors of this statute noted, "Given the climate in the legislature in 1984, we were very lucky to get this bill out of committee, let alone get it passed and signed by the Governor."[72]

Because no appellate court cases have tested this statute,[73] the precise extent of the protections for listed species conferred by CESA remains unclear. No actions have been taken to force agencies to halt projects that may threaten listed species,[74] and the Act contains no sanctions for state agencies which approve projects which fail to comply with its provisions.

4. CESA Grants DFG No Real Authority in the Consultation Process. As described above, state lead agencies wishing to engage in projects which may impact the continued existence of a listed species must consult with DFG, and DFG must make a written jeopardy finding with respect to the species.[75] While the Department may describe and insist that the lead agency incorporate reasonable and prudent alternatives which would prevent jeopardy to the listed species, that lead agency may ignore the Department's suggestions so long as it incorporates mitigation measures and it finds both that the project as proposed is of significant public benefit and that it has not acted in bad faith by infusing money into the project after DFG consultation has commenced.[76] In describing DFG's chances of forcing the use of alternatives, the top Department official in charge of implementing CESA stated, "If push came to shove, and we insisted, we would probably lose."[77]

5. FGC Is Free to Engage in Ex Parte Contacts and Ignores Conflict of Interest Prohibitions. The five-member Fish and Game Commission is the state policymaking board responsible for deciding, at a public and open meeting, whether to designate a species as a "candidate", and (one year later) whether to list a species as endangered or threatened, thus affording it the permanent protections of CESA. These listing decisions may be expensive ones for many interested parties, yet nothing in CESA or the Fish and Game Code prevents FGC commissioners from engaging in off-the-record, ex parte contacts outside the public hearing at which the decision is made.

Further, FGC members appear to be unaware of or unwilling to follow state law prohibiting participation in an official vote which constitutes a conflict of interest.[78] The *Sacramento Bee* discovered that FGC Commissioner Benjamin F. Biaggini—former chair, chief executive officer, and director of Southern Pacific Transportation Company—recently voted against a proposed listing which would have resulted in restrictions on Southern Pacific's use of a railroad right of way. He also voted

to reject the proposed listing of the flat-tailed horned lizard; its territory includes land set aside for geothermal exploration and production by Southern California Edison and Unocal Inc. According to the *Bee*, Biaggini owns more than $100,000 of stock in each of those companies.[79]

B. The Agencies Responsible for Implementing CESA

The discussion above points out serious weaknesses in the drafting and structure of CESA itself. However, even the best-drafted statute is only as good as the agency implementing it. The Commission on California State Government Organization and Economy ("Little Hoover Commission" or "LHC") recently completed a yearlong study of the structure and performance of both DFG and FGC.[80] According to the Little Hoover Commission, if the legislature is committed to the preservation of California's unique flora and fauna, it must not only strengthen CESA; it must dramatically revamp the structure and resources of the agencies responsible for implementing it.

1. The Little Hoover Commission's Evaluation of DFG and FGC. LHC's report first focuses on the historical purpose of the two agencies, the gradual shift in legislative policy and public opinion toward environmental consciousness and conservation, and the failure of the two agencies to adjust their orientations to that mandated focus.

In 1951, the legislature created DFG as part of the state Resources Agency; its primary (and admittedly vast) responsibility is the management of California's fish and wildlife resources.[81] In creating DFG, the legislature vested in one department the duty and authority to pursue four main objectives: (1) to maintain all species of wildlife; (2) to provide for diversified recreation; (3) to provide an economic contribution to California's economy; and (4) to promote scientific and educational use through management of fish and wildlife.[82] DFG, which maintains five regional offices throughout the state, is administered by a Director, who is appointed by the Governor and confirmed by the Senate for an indeterminate term.[83]

Pursuant to Article IV, section 20 of the California Constitution, the Fish and Game Commission is the policymaking board of the Department. It is composed of five part-time commissioners, all appointed by the Governor, who serve for six-year terms.[84] Other than receiving Senate confirmation, commissioners need not possess any specific qualifications in order to be appointed. FGC's general charge is to formulate policies governing the conduct of DFG. FGC is required to hold at least ten public meetings per year[85] and is subject to the Bagley-Keene Open Meetings Act[86] and the Administrative Procedure Act;[87] thus, it must adopt regulations and conduct its decisionmaking at public, open meetings after notice to the public and an opportunity for comment.

Whereas the "original charter" of FGC was to "provide for reasonably structured taking of California's fish and game,"[88] FGC is now responsible for determining hunting and fishing season dates and regulations, setting license fees for fish and game taking, listing endangered species, granting permits to conduct otherwise prohibited activities (*e.g.*, scientific taking of protected species for research), and acquiring and maintaining lands needed for habitat conservation.[89] This list is by no means comprehensive; it merely serves to illustrate the variety of sometimes-conflicting activities that receive Commission attention.

As noted, the Commission and the Department were created to administer a broad legislative mandate. These far-reaching responsibilities have become increasingly difficult due to California's astounding population growth and the housing and development needed to accommodate that growth. In addition, over the years the legislature has required FGC and DFG to incorporate and implement an entirely new set of priorities. These directives—embodied in CESA and the California Environmental Quality Act (CEQA)—now require DFG and FGC to effectively guard and conserve California's wildlife populations and their habitat, rather than simply maintaining them for their structured taking by hunters and fishers. Under CEQA, "the maintenance of a quality environment for the people of this state now and in the future is a matter of statewide concern," and every citizen, corporation, and public agency "has a responsibility to contribute to the preservation and enhancement of the environment."[90] This mandate expressly includes preventing the elimination of fish and wildlife species, insuring that fish and wildlife populations do not drop below self-perpetuating levels, and preserving for future generations representations of all plant and animal communities and examples of the major periods of California history.[91] Under CEQA, DFG is a "trustee agency": "a state agency having jurisdiction by law over natural resources...which are held in trust for the people of the State of California."[92]

The expanding role of DFG/FGC in protecting California's environment now includes many responsibilities that were never contemplated when either were created. While the Little Hoover Commission's report focused on the performance of both entities in administering all of their statutory responsibilities, some of the Commission's findings are particularly relevant to the ability of DFG/FGC to adequately implement CESA:

**There are no clear and publicly understood criteria for selection and appointment of Fish and Game Commissioners.* "The Fish and Game Commission's mandate and related activities have grown far beyond the time when the good intentions and honest opinions of five sportspersons could be relied on to mold the state's natural resources policies."[93]

**FGC, as presently structured, cannot adequately exercise its statutory authority over the Department.* The Hoover report discussed several facets of this criticism: (1) the Department Director is selected by the Governor (as are the FGC Commissioners), instead of serving at the pleasure of FGC; (2) the current DFG Director has stated that his primary responsibility is to the Governor, and not to FGC; (3) FGC is necessarily reliant on DFG for research and scientific information, due to FGC's minimal staff and resources; (4) FGC is not an effective, viable policymaker for DFG, because the Commission's constitutionally authorized structure places it outside the executive branch, and FGC's ability to exercise administrative control over DFG's implementation of policy is undercut; and (5) there is little or no "unity of perspective, unity of operation," or even formal relationship among DFG, FGC, and the Resources Agency within which both reside.[94]

**FGC has difficulty in meeting its mandate because of external pressures.* The Little Hoover Commission noted the "wildly conflicting pressures" of trying to allow hunters and fishers their traditional access to fish and game, while simultaneously attempting to maintain the natural diversity and populations of California's wildlife.[95] The Hoover report noted that this problem is especially serious in cases where scientific evidence is not available or is inconclusive; in these and other cases, FGC has often bowed to political pressures from executive branch appointees and/or to its own apparent internal bias in favor of sportspeople.[96]

**Both DFG and FGC are underfunded; DFG is not capable of appropriately allocating resources.* FGC, which is staffed by an Executive Secretary, an Assistant Executive Secretary, and five clerical support positions, was allocated only $429,000 in 1989-90. It is thus required to rely heavily on DFG staff resources for technical and support research and assistance.[97]

In 1988-89, DFG's six offices functioned with a staff of 1,568 full-time positions and a total budget of $118 million.[98] In that same year, DFG's overall budget was funded from several revenue sources, including $12.5 million from the California Environmental License Plate Fund, $67.9 million from the Fish and Game Preservation Fund (which includes all monies from the sale of licenses, permits, fees, and/or penalties), $15.7 million from the federal government, and $8.9 million from the state's general fund. CESA implementation is funded through DFG's Natural Heritage Account, which received $11.2 million in 1988-89. This account was decreased to $10.3 million in 1989-90, and the Governor's proposed 1990-91 budget would further decrease the funding for this account to $8.9 million,[99] despite the increasing size of the state's threatened and endangered populations.[100]

Both DFG and its critics agree that these numbers are insufficient to finance the Department's mandated responsibilities.[101] Further, "both critics and the DFG suggest the present system of categorical funding of specific departmental activities is inconsistent with changing and accelerating needs."[102] This legislative restriction on DFG's use of particular funds for particular programs, found in Fish and Game Code section 711, requires, *inter alia*, that the costs of all nongame fish and wildlife programs (including CESA) be funded *only* through appropriations from the state general fund and sources other than the Fish and Game Preservation Fund.[103] In other words, the largest source of DFG revenue—"consumptive use" fees of various types (fishing/hunting permits, licenses, fees)— may only be used to support "consumptive-oriented" programs.[104]

This restriction has been identified by a special Resources Agency task force as the source of "growing tension between availability of funding for game activities (supported by the Fish and Game Preservation Fund) and for non-game activities (supported largely by the General Fund)."[105] According to the task force,

> [o]n the one hand, the kinds of expenditures that can be made from the Fish and Game Preservation Fund are statutorily restricted, with constituent groups actively monitoring revenues derived from fees and licenses charged to them. On the other hand, nongame workload has been growing at a time when the availability of General Fund revenues has been limited.[106]

This "alleged funding imbalance for nongame activities"[107] is exacerbated by DFG's historical lack of a consistent and comprehensive cost allocation methodology and its inability to account for expenditures.[108]

Further, the Little Hoover Commission found that DFG is not capable of appropriately allocating resources.

> The Department cannot provide the required level of monitoring, enforcement and timely expertise and research consistent with the requirements of its mandate. Increasingly, policy and implementation decisions, especially with respect to staff support to the FGC, must be made on the basis of incomplete or dated information. This situation is largely determined by the previously noted lack of sufficient resources, but also owes itself to an unfortunate configuration of accelerated (and in some case not fully informed) public expectations, critical wildlife and habitat needs and a late-developing science.[109]

2. Petition Backlog Within FGC and DFG. In addition to the serious problems noted by the Little Hoover Commission, we note that a large and growing backlog of species is awaiting action by DFG and FGC—further corroborating the inadequacy of DFG/FGC's staff and resources. California currently lists 280 plants and animals as endangered, threatened, or rare.[110] According to DFG's last count, the number of *additional* species that could presently meet the criteria for listing totals over 650.[111] These plants and animals are awaiting Department action recognizing their dwindling population numbers. The number in this group increases constantly and, without action, is expected to top 1,000 by the year 1994.[112]

In 1988, with over 600 species whose population levels warranted attention, only 33 were reviewed by the Commission. Of those 33, two were listed and two were rejected. The final 29 (four animals and 25 plants) remained as candidates for listing, to be reviewed in 1989 following their one-year review period.[113] In 1989, FGC listed the four animal species and 22 of the plants.[114] DFG recommended the listing of two additional animals (the flat-tailed horned lizard[115] and the Suisun song sparrow); however, FGC rejected DFG's recommendations.[116]

When confronted with these rather pathetic statistics in light of the huge number of species awaiting listing and the irreparable harm at stake, the Department defended itself by stating that the lengthy petition process is clearly spelled out in the enabling statute. The Department argued that simply listing a species without a thorough review would circumvent the very statute that environmentalists seek to enforce. DFG also pointed out that without a complete study of a petitioned species, some may be listed that should not be. "If you list things that do not belong there, you call into question the legitimacy of other species that clearly need to be on the list."[117]

The Department's limited nongame heritage account, which includes funds for implementing CESA, is clearly an inhibiting factor in diminishing the huge backlog of species which, according to DFG, probably deserve to be listed now. A 1987 study of California's natural diversity prepared at the request of the Senate Committee on Natural Resources and Wildlife concluded: "[i]ncreased scientific and administrative effort is needed to accelerate the scientific evaluation of species' statuses and to process the legal documentation required to list species under [CESA]."[118]

3. DFG's Commitment to Enforcing CESA Is Minimal. Although we previously criticized CESA for its failure to vest DFG with any real authority in CESA's consultation process, DFG recently refused to enforce the consultation requirement *en toto*, and in the process abdicated its responsibility as the guardian of California's endangered species and its jurisdiction over natural resources "held in trust for the people of the State of California."[119]

During the past year, the California Department of Food and Agriculture (CDFA) has waged an expensive and not entirely successful war against the Mediterranean fruit fly (Medfly) and the Mexican fruit fly (Mexfly). Since August 1989, CDFA's discovery of fertile flies in southern California has resulted in the imposition of "pest eradication procedures," including broad-scale aerial malathion spraying.[120] Although several cities have attempted to halt or postpone the spraying through petitions for writ of mandate, none have been successful to date.

One such city—the San Diego suburb of El Cajon—became the target of

CDFA and its insecticide-laden helicopters through a May 10, 1990 decision of the CDFA Director, as a result of the discovery of three Mexflies. In its petition challenging the decision, El Cajon alleged CDFA's violation of CESA as one cause of action.[121] The City argued that the second largest population in the United States of the Least Bell's Vireo—listed as endangered by FGC since 1980—inhabits an area just two miles downwind of the malathion spray zone. El Cajon produced declarations and testimony of several well-known biologists and entomologists stating that the birds were nesting at the time of the aerial spraying; that the birds' primary food source is insects; and that broad-area aerial malathion spraying would result in an almost complete loss of the insect population in the area sprayed. These experts urged a full-scale evaluation by DFG of the impact of the reduced food supply on the adult birds, foraging for food for the nestlings, the nestlings themselves, and on the birds' ability to build up the nutritional reserves needed for a successful migration after the nesting season is completed.

El Cajon also alleged that CDFA had failed to comply with CESA's consultation requirement, thus depriving DFG of the opportunity to engage in the kind of evaluation deemed necessary by the experts. The City based its allegation upon statements by several relevant DFG biologists confirming CDFA's failure to engage in either formal or informal consultation.[122] At most, CDFA had made one telephone call to DFG "to find out if there are any endangered species in the El Cajon area;"[123] CDFA was told to check DFG's Natural Diversity Data Bank. Further, that phone call did not take place until May 17 or 18—well after the announced decision of the CDFA Director to commence aerial spraying in El Cajon. Two biologists in DFG's regional office covering El Cajon stated that the phone call and the information exchanged in it constituted neither a formal nor an informal consultation pursuant to CESA.[124]

In spite of their acknowledgement that CDFA had failed to engage in anything remotely resembling a bona fide consultation, the DFG biologists refused to assist El Cajon. When asked whether DFG would participate as co-petitioner in the mandamus action—to assert DFG's own statutory right to be consulted—DFG's Endangered Species Act Coordinator refused, stating that his superiors would never allow such an action.[125] When asked to provide declarations in support of El Cajon's assertions, several DFG biologists also refused.[126]

At a three-day trial on the City's motion for permanent injunction, DFG biologist Krishan Lal—much to the City's chagrin—apparently turned that one phone call into a "consultation" under CESA. In deciding against El Cajon and permitting the aerial spraying to continue, Municipal Court Judge J. Michael Bollman, sitting as a Superior Court judge, ruled that CDFA did in fact "consult" with DFG pursuant to CESA.[127]

This ruling, which is pending appeal,[128] devastates CESA's consultation requirement. The consultation requirement of CESA's Article 4 clearly contemplates the exchange of documents and the details of the proposed project, an analysis and determination by DFG based on the "best available scientific information," and a "written finding [by DFG] based on its determination of whether a proposed project would jeopardize the continued existence of any endangered species...."[129] CDFA's eleventh-hour attempt, now validated by a lower court, does not approach true compliance with the letter and spirit of the statute, and the whole incident is a clear demonstration of DFG's indifference, weakness, and lack of commitment to its statutory responsibility.

4. Politics in the Listing Process. In an ideal world, FGC's listing decisions should depend solely on the scientific evidence presented with a petition. Unfortunately, CESA requires no such thing, and real-world problems and politics enter into the decisionmaking process. "When politics and biology mix, biology often loses."[130]

The most recent example of the intrusion of politics into what should be a scientific decision is the case of California's official state reptile, the desert tortoise.[131] Since 1984, conservationist groups such as Defenders of Wildlife and the Desert Tortoise Council have been attempting to secure both state and federal listing for the species, due to dramatic declines in its population in the western Mojave Desert. Biologists estimate that the tortoise population has dropped 90% in the past fifty years, and between 30%-70% in the last eight years alone.[132] The tortoise has been plagued by a series of problems including habitat destruction, malnutrition due to loss of native plants to cattle grazing, theft and wanton shooting by "plinkers" who use the slow-moving animals for target practice, and constant attacks by predators such as ravens.[133] Moreover, a viral respiratory infection, introduced from captured animals returned to the desert, has affected most of the remaining wild desert tortoises.[134]

Despite the substantial evidence indicating that listing was warranted, several groups—including ranchers, mining interests, and off-road vehicle users—actively opposed listing. If the tortoise were listed, the state would restrict cattle grazing, prevent mining, and halt the use of off-road vehicles in state-controlled, critical tortoise habitat. Because the tortoise's range includes much of the western Mojave Desert, listing could result in significant limitations on desert use. However, precise restrictions and their cost are not known, and are not properly a part of the decision to list or not to list a species under the statutory scheme.

After years of delay and debate, FGC finally designated the tortoise as a "candidate" species in November 1987. One year later, FGC unanimously approved the proposed listing at its section 2075.5 "final consideration" hearing on November 10, 1988,[135] and scheduled a rulemaking proceeding to amend section 670.5 of its regulations to list the desert tortoise.[136]

While the opposition of these constituencies was expected, the objection of the federal Bureau of Land Management (BLM) was not. In a February 1, 1989 letter to FGC—just two days before the Commission was scheduled to vote on proposed rulemaking which would finally list the tortoise, BLM requested that the state delay listing for two to four years. BLM's stated reason for this request was that it would like time to implement protection programs for the tortoise on federally controlled lands before California acts to protect the species; BLM also noted that state listing could be perceived as overly restrictive by sheep grazers and off-road vehicle enthusiasts.[137]

Several groups were amazed at BLM's action, and urged FGC to ignore it. BLM's position was especially surprising in light of its own studies, which confirmed a 50% population decline during the past six years in the western Mojave desert.[138] The Desert Tortoise Council, which originally petitioned for the listing of the tortoise, argued that the proposed state listing would only enhance conservation efforts, and would in no way affect federal projects because it would not apply to territory under BLM's jurisdiction. Conservationists also argued that to delay listing for two to four years would probably render any eventual designation meaningless; the tortoise would probably become extinct during that time.

On February 3, 1989, at the meeting at which FGC was scheduled to vote on the proposed rulemaking, BLM's own biologist Kristin Berry stated that the Commission should ignore the request of her employer and act immediately to protect the tortoise. According to Berry, "The state listing of the desert tortoise is absolutely essential to maintaining viable healthy populations, and to stopping severe declines in existing populations."[139] DFG also strongly endorsed listing the desert tortoise as threatened.

Despite the substantial scientific information supporting the petition, its own earlier unanimous vote at the "final consideration" hearing, and the Department's strong backing of the listing, the Commission gave in to the political pressure, refused to adopt the proposed rulemaking which would have effectuated listing on February 3, and put the matter over until its June meeting.[140] While the tortoise was eventually listed by the Commission in June 1989, its five-year delay (where time is clearly of the essence) and 3-2 vote (in spite of overwhelming scientific evidence) left many environmental groups understandably skeptical of FGC's commitment to protecting species.[141] If California's official state reptile becomes extinct, the blame may be placed squarely on the shoulders of BLM and FGC.[142]

IV. NEW DIRECTIONS FOR SPECIES PROTECTION IN CALIFORNIA

Since CESA became law, many suggestions have been made to amend it and/or to enact supplemental legislation which will offer more meaningful protection to the state's threatened and endangered populations. Some recommendations focus solely on the procedural side of the listing process; others seek to balance the membership of the Fish and Game Commission and clarify legislative intent regarding its role and its relationship to the Department; still others would give selected species protective status by bypassing the statute altogether. This section will identify and explain the most recent proposals to change the way in which threatened species receive protection within the state.

A. Improving the Listing Process

In 1989, Senator Dan McCorquodale —disturbed by FGC's stalling on the desert tortoise petition—introduced SB 999. In its original form, SB 999 would have shortened the listing process by forcing the Commission to combine its section 2075.5 "final consideration" hearing with the hearing on proposed rulemaking required by CESA and the Administrative Procedure Act. As introduced, SB 999 would also have eliminated the required OAL review of a favorable listing decision, and made the listing effective upon the date of FGC's adoption.[143] According to the analysis of the Assembly Committee on Water, Parks and Wildlife, "this bill would close the existing loophole by requiring the Commission to adopt an implementing rule or regulation upon making its final decision and by preventing the Commission from using the Office of Administrative Law procedures to thwart the listing procedures contained in existing statutes."[144]

Environmental groups saw this bill as one way of accelerating and removing politics from the listing process. Citing their struggle to list the desert tortoise despite the scientific evidence that clearly favored its listing, conservationists viewed this legislation as both necessary and long overdue.[145] Additionally, neither FGC nor DFG opposed the bill. However, Governor Deukmejian vetoed it on September 26, 1989. In his veto message, the Governor objected to "reduc[ing] the two-hearing process into one concurrent public hearing," finding that "these changes are not in the public's interest."[146]

B. Reforming FGC and DFG

At this writing, several bills which would revamp FGC are pending in the legislature. Senate Bill 2840 (McCorquodale), introduced on March 2, 1990, would transfer all of the powers and duties of FGC to a newly-created Fish and Wildlife Commission (FWC). FWC would be composed of twelve members who would serve four-year terms; the Governor, Assembly Speaker, and Senate Rules Committee would each appoint four members. Senator McCorquodale's bill sets forth qualifications for the members of the new FWC: specific members would represent various interested constituencies, including hunting organizations, recreational fishing organizations, environmental organizations, commercial fishers who are California residents, animal protection organizations, and land trust organizations. Other FWC members would include persons with postsecondary degrees in wildlife management, marine biology, and fisheries biology; and three public members.

Assembly Constitutional Amendment 51 (Campbell), as amended June 28, would similarly replace the existing FGC with a Fish and Wildlife Commission, this one composed of nine members each serving four-year terms. The Governor would appoint five of the members, subject to Senate confirmation; the Senate Rules Committee and the Assembly Speaker would each appoint two members. ACA 51 also sets forth qualifications for membership: specified members must have experience in wildlife management, marine biology and fisheries biology; other members would represent hunters, land trusts, recreational sportfishers, environmental organizations, and commercial fishers; finally, one member would be a public member. Additionally, ACA 51 attempts to ensure geographical representation: the five gubernatorial appointees must each represent one of five fish and game districts; and the four legislative appointments must be split between northern and southern California representatives.

A package of bills carried by Assemblymember Jim Costa takes a different approach altogether. As amended April 16, Assembly Bill 3160 (Costa) would transform FGC into a mere advisory committee, and transfer FGC's existing powers and duties to DFG. Assembly Bill 3159 (Costa), as introduced February 22, 1990, would rename DFG as "Department of Fish and Wildlife" (DFW), and declare that the Department has been delegated the primary responsibility for the protection and preservation of the fish, wildlife, and native plants of California. The bill also requires all state and local agencies to give "great weight" to the findings of DFW regarding the protection, preservation, restoration, and maintenance of fish, wildlife, and native plants and the habitat necessary for those purposes. Finally, Assembly Bill 3158 (Costa) attempts to increase DFW's revenues by transferring from FGC to DFW the authority to set fees for the issuance of all licenses, tags, certificates, and other entitlements. Where no fee is set in statute, DFW would be allowed to set one. The bill would also authorize DFW to establish a fee to cover its reasonable costs for monitoring and enforcing resources protection policies relating to state- and local agency-funded or approved projects.

C. Proposed "Species of Serious Concern" Category

One attempt to change the state's system of protecting species has come from within the Commission. In February 1989, FGC proposed regulation

changes that would have made listing "permissive" rather than "mandatory"; they also would have required DFG to prepare recovery plans in lieu of the listing of species as threatened or endangered.[147]

Following the receipt of outraged comments from conservationists, the Commission amended the language of its proposed regulatory changes. The amended language would have provided for the establishment of a list of "species of serious concern," in addition to the two existing designations of threatened and endangered. Further, the amended language would have required DFG to prepare recovery plans for all threatened and endangered species, as well as for species of serious concern.[148]

The Commission explained that the purpose of the proposed rule was to enable it to identify species which are not yet threatened or endangered, but which are of "serious concern" because of dwindling populations or habitat. The Commission also noted that it wanted regulations requiring DFG to prepare recovery plans, which would help enhance threatened or endangered species so they may eventually be taken off the protective lists.

This regulatory proposal worried environmental groups. While many conservationists supported the idea of a "serious concern" category to monitor declining species, some were fearful that the Commission would use this new classification to avoid listing species—a fear prompted particularly by the language of the regulation as originally proposed. Also, because CESA provides protection only for species listed as threatened or endangered, this new category would offer no substantive protective status.

In part because of the reaction from environmental groups, the Commission dropped this proposal in June 1989.[149] It is, however, still studying the possibility of creating this category.

D. Protecting Species Without Using CESA

Some conservationists are using a different approach—the initiative process—in seeking increased protection for species in the state. In 1986, a state statute which granted protective status to the mountain lion expired.[150] Subsequently, FGC approved two mountain lion hunts, both of which were struck down by the San Francisco Superior Court.[151] The Mountain Lion Preservation Foundation recently sponsored an initiative that removes the mountain lion issue from FGC and DFG and reestablishes in statute protections for California's mountain lions. Proposition 117, which was successful on the June 1990 ballot, prohibits trophy hunting of mountain lions and allocates $30 million per year for thirty years to acquire habitat for mountain lions, deer, and threatened and endangered species.

This proposal is unique in that it is the first attempt to propose protection for an individual species through the initiative process. Some DFG representatives are worried that if more are proposed for other species, California could end up with a crazy-quilt of laws to protect individual groups of wildlife. Another concern is that this and future similar initiatives will undermine the very purpose of CESA.

But perhaps the biggest worry at DFG regarding this proposal is that the $30 million fund to protect the mountain lion and acquire habitat must come from existing revenue sources; the initiative makes no provision for new money. Because no new funds are provided, DFG fears that existing and vital programs will have to be curtailed. DFG also argues that, in relation to listed species, the mountain lion has a healthy population level; if CESA dollars are diverted to finance Proposition 117, listed species could suffer as a result of this initiative.[152]

Sharon Negri, a leader in the fight for this initiative, disputes DFG's concerns. She states that the initiative would not have been necessary had the Commission not insisted on approving a hunt. Proposition 117 will not weaken wildlife protection, she notes, but rather strengthen it by demonstrating to the legislature and the Governor that the people of California will not tolerate needless destruction of wildlife.[153]

V. CONCLUSION

In its five-year existence, CESA has—at best—delayed the extinction of 280 California species. If the legislature truly seeks to *prevent* the extinction of the 280 species listed by FGC and 650 others which—according to DFG—deserve listing now, it must act expeditiously to overhaul the statute, its regulatory process, and the agencies responsible for implementing it.

Strengthening the language of the statute itself, while a band-aid approach, is one place to start. A variation on SB 999's theme would require FGC to immediately adopt an emergency amendment to its regulations at the time it approves a species for listing at its section 2075.5 "final consideration" hearing. This step would alleviate some of the delay in the process while preserving the systematic review of state agency rulemaking actions by OAL.

At the very least, the legislature should require FGC to adopt *real* criteria for listing species. FGC's existing "criteria" are simply a restatement of the statutory language, and do not even attempt to quantify a point at which the Commission *must* list. If FGC continues to balk, the legislature should enact mandatory listing criteria for it, and amend CESA to require FGC to rely solely upon the scientific information produced by DFG and/or the petitioner in support of listing.

Additionally, the legislature should waste no time in enacting a strong rule outlawing ex parte contacts by or with FGC commissioners during the pendency of any rulemaking proceeding, including proceedings to list species. Off-the-record contacts during an ongoing proceeding, to which no one has an opportunity to respond, completely defeat the purpose of the Administrative Procedure Act and the Bagley-Keene Open Meetings Act—both of which are fully applicable to FGC. An ex parte prohibition during a listing proceeding is particularly appropriate, because it is quasijudicial in nature; it focuses on the eligibility of a single species for listing.

Also, in light of the commissioners' apparent unfamiliarity with state conflict-of-interest prohibitions, the Resources Agency (in conjunction with the Fair Political Practices Commission) should sponsor a detailed ethics training program for all members of its constituent boards and commissions.

Rather than curing the symptoms of the problem, however, the legislature should tackle the disease: the structural flaws which prevent FGC and DFG from fulfilling their statutory mandates. As noted by the Little Hoover Commission, FGC's focus is simply outdated; its hunters-only membership and apparent bias are simply inconsistent with the majority of environmentally-enlightened Californians. Just as the legislature recently abolished the California Waste Management Board for its failure to tackle this state's serious solid waste crisis with modern-day solutions such as recycling and source reduction,[154] the legislature must reestablish its intent with regard to the priorities of DFG and FGC, to eliminate the traditional "structured-taking" purpose of the agencies and infuse them with priorities of preservation and enhancement.

However, the approaches taken in SB 2840, ACA 51, and the Costa package are seriously flawed. SB 2840 and ACA

51 suffer from the Sacramento-style assumption that government operates properly through "governance by vector." That is, an agency should represent the profit-stake interests (the "players") concerned about its decisions. State policy therefore is the end result of the preferences of these actors, each vectoring their influence into a final mix.

However, the very notion of government in many contexts is the recognition of the structural impossibility of private interests combining to act in the public interest. Indeed, the existence of most regulatory agencies is purportedly justified by the need for a public substitute or countervailing adjustment. It is ironic to create an agency to protect the public from profit-stake interests, and then turn that agency over to those very interests or to their surrogates. In the area of protecting endangered species, the Sacramento preoccupation with bringing all "players" together to resolve public policy issues is most self-defeating. Here, the interest vindicated by FGC's purpose is one of the most underrepresented in the state: the future, the gene pool of the earth, the inarticulate plants and animals in danger of extinction.

Both proposals for FGC reform simply take a list of those with profit-stake interests, stir in several persons with an academic or broader perspective, and declare the stew equitable. However, the purpose of FGC purportedly is to represent the state's interest in advancing a human ethic representing our highest aspiration: leaving the earth to our legatees without the loss of plants and animals which will never again appear but for our protective intervention. Each and every person governing that agency should be true to its mission and concerned primarily with the accomplishment of its purpose, not with collateral or contrary agendas.

While well-intentioned, these "reform" bills ignore the fact that the Department of Fish and Game was not created to safeguard the interests of hunters, or commercial fishers, or animal protectionists, or land trust organizations. These special interests are perfectly capable of making their views known to the regulatory agency and to the legislature. Vesting them with the actual decisionmaking authority as the "state" is a form of political immorality. Any entity permitted to establish state policy should consist solely of public members who are untainted by any pecuniary, personal, or profit-stake interest in the decisions made.

Worse still, the Costa bills would wipe out FGC—the only forum before which the public may express its views and petition for redress of its grievances regarding the preservation of California's flora and fauna. As weak, biased, and inadequate as the current FGC may be, it is at least required to meet in public, make its decisions in public, and listen to the public. Transferring FGC's authority to DFG, no matter what its name may become and regardless of its new priorities, would enable a single director to make all policy decisions behind closed doors—free from public debate or meaningful input.

The Fish and Game Commission was created in the California Constitution, and should not be denigrated into an advisory board. The existence of FGC is the structural saving grace of DFG; without FGC, DFG is like the Department of Insurance, the Department of Corporations, and the Department of Banking—all of which are regrettably run by a single political appointee who is not required to hold open meetings at which the public may meaningfully debate or contribute to proposed policies. The answer here is not to abolish FGC but to strengthen it, make it independent of the Department and of all the constituencies which would control it, and give it the charter, authority, and resources it must have in order to accomplish its mission.

If we are serious about our obligations to the generations to follow us—an obligation which one might argue goes to the heart of the human ethical imperative—then our system of protection must identify those species in danger of extinction— far enough in advance to ameliorate the cost of preservation, and to make it practically possible. And it must have the authority to protect. To be sure, that protection may involve an element of taking. Where that element of taking occurs without adequate advance warning, the general public should be prepared to pay compensation, and should not impose extreme costs on a few private interests for a benefit conferred on all of us and our progeny. We should be prepared to pay that price. If we want to change private forces to protect that which is in jeopardy, it may hurt all of us a little to do it. But given the material wealth we have created, particularly in one of the wealthiest political jurisdictions in the world, we have no excuses to offer those who will judge our performance in the decades to come. We have no excuses at all.

FOOTNOTES

1. Fish and Game Code § 2050 *et seq.*
2. Department of Fish and Game, *1989 Annual Report on the Status of California's State Listed Threatened and Endangered Plants and Animals* (hereinafter "*1989 Annual Report*") at ii (March 1990); *see also* Bowman, *Endangered Species Losing Out,* Sacramento Bee, Apr. 13, 1990, at A1; San Diego Union, Apr. 14, 1990, at A4. The draft of DFG's annual report, which is required by law to be published by January 30 every year, was not released to the Fish and Game Commission until March 1990. It was reviewed and approved for publication by FGC at its May 1990 meeting.
3. *Id.*
4. *Id.* at 2.
5. *But see infra* text accompanying notes 119-29.
6. Fish and Game Code § 2051.
7. CESA focuses on protection of listed species from *state*-sponsored activities; it does not directly protect state-listed species from harm caused by the federal government, local governments, or private action. Although CESA encourages private landowners to "cooperate" in the state's goal of species conservation and protection, Fish and Game Code § 2056, and prohibits individuals from taking listed species, *id.* at § 2080, its thrust is primarily aimed at protecting listed native species from adverse impact caused by the state.

However, listing of a species by FGC pursuant to CESA indirectly protects the species from harm caused by local governments and private interests, under the provisions of the California Environmental Quality Act (CEQA), Public Resources Code § 21000 *et seq.* CEQA, which is applicable to governmental agencies at all levels and private projects which require government permits, leases, or other entitlements, effectively forces agencies to seek feasible means to reduce or avoid significant environmental damage that otherwise could result from their actions. *Id.* at § 21002. Whenever a proposed "project" may cause a "significant effect" on the environment, public agencies (both project proponents and those approving private projects) must prepare an environmental impact report (EIR). *Id.* at §§ 21002.1, 21082.2. Adverse impact on a state-listed species must be addressed in the EIR for any "project" under CEQA, which is broadly defined as "the whole of an action, which has the potential for resulting in a physical change in the environment...." 14 California Code of Regulations (CCR) § 15378(a) (Resources Agency's Guidelines for Implementation of the California Environmental Quality Act). Thus, state listing has serious consequences for all

actors wishing to engage in numerous types of land use and development.

Although the vast body of CEQA law provides an important backdrop for any discussion of environmental protection, this article is intended to illuminate CESA and does not address CEQA in depth. For an excellent and exhaustive treatment of CEQA, *see* Remy, Thomas, *et al.*, **Guide to the California Environmental Quality Act** (1989 Edition).

Further, this article does not discuss the federal Endangered Species Act of 1983, 16 U.S.C. § 1531 *et seq.*, upon which CESA was based.

8. Fish and Game Code §§ 2070-2079.

9. *Id.* at § 2062.

10. *Id.* at § 2067.

11. *Id.* at § 2070.

12. *Id.* at § 2072.7. Most petitions to list species are initiated by the Department.

13. *Id.* at § 2072.3.

14. *Id.* Other factors which must be addressed in the petition include the impact of existing management efforts; suggestions for future management; information regarding the kind of habitat necessary for species survival; a detailed distribution map; and any other information the petitioner deems relevant. *Id.*

15. *See supra* note 7.

16. Fish and Game Code § 2072.7.

17. *Id.* at § 2073.5. DFG is not required to engage in any investigation of its own; its evaluation of the requested listing is based solely on the information presented by petitioner in the petition. *See id.* at § 2074.8 ("[n]othing in this article imposes any duty or obligation for, or otherwise requires, the commission or the department to undertake studies or other assessments of any species when reviewing a petition and its attendant documents and comments").

18. *Id.* at § 2074.

19. Section 2068 of the Fish and Game Code defines a "candidate" species as "a native species or subspecies of a bird, mammal, fish, amphibian, reptile, or plant that the commission has formally noticed as being under review by the department for addition to either the list of endangered species or the list of threatened species, or a species for which the commission has published a notice of proposed regulation to add the species to either list."

If DFG finds that there is insufficient information in the petition to indicate that the petitioned action may be warranted, this finding is theoretically subject to a petition for writ of mandate under section 1094.5 of the Code of Civil Procedure. Fish and Game Code § 2076.

20. In fact, "candidate" species are subject only to the taking prohibition of Fish and Game Code section 2080 (if FGC issues a specified notice, pursuant to section 2085). They are not entitled to any of the other protections afforded listed species under Articles 3 and 4 of CESA; *see infra* Section II(B) for information on these protections.

21. Fish and Game Code § 2074.6.

22. *Id.* at § 2075.

23. *Id.* at § 2071.5. FGC's "criteria" implementing CESA are codified at 14 CCR § 670.1(b); *see infra* text accompanying note 66 and n.66.

24. The regulations promulgated by FGC under CESA appear in section 670.1-670.5, Title 14 of the CCR.

25. Fish and Game Code § 2075.5(2). In other words, if FGC decides—after its ten-day review period, DFG's ninety-day preliminary review period, and DFG's subsequent one-year formal review period—that the proposed listing is warranted, it must then formally adopt an amendment to section 670.2 or 670.5, Title 14 of the CCR, to officially add the species to the appropriate list. Formal rulemaking procedures and provisions for OAL review–which themselves often consume at least six months to one year—are codified in the Administrative Procedure Act, Government Code § 11340 *et seq.*

26. Fish and Game Code § 2076.

27. *Id.* at § 2076.5. This provision and section 240 of the Fish and Game Code authorize FGC to engage in emergency rulemaking under section 11346.1 of the Government Code. Any emergency listing adopted pursuant to these sections is effective for 120 days, Government Code § 11346.1(e), during which time the Commission must initiate formal rulemaking proceedings pursuant to Government Code section 11340 *et seq.* *See supra* note 25 and accompanying text.

28. Emergency listing of a species carries with it all the protections afforded to species listed through the normal rulemaking process. *But see infra* text accompanying note 62.

29. Fish and Game Code § 2077.

30. *Id.* at § 2077(e).

31. *Id.*

32. *Id.* at § 2079.

33. *Id.* at § 2080. Under section 2081, DFG may enter into memoranda of understanding or grant permits to "authorize individuals, public agencies, universities, zoological gardens, and scientific or educational institutions" to take listed species "for scientific, educational, or management purposes."

The section 2081 "management take" exception to the taking prohibition is becoming the object of concern to some environmentalists. In an April 20, 1990 letter to Richard Spotts, the California representative of Defenders of Wildlife, DFG Director Pete Bontadelli stated that the Department has recently been "developing the use of Section 2081 in situations where enhancement and conservation of a species occur as part of a management action that also involves some take." In other words, DFG has granted "management take" permits to developers in exchange for their agreement to "acquire sufficient off-site mitigation land to replace or enhance the impacted species population or, alternatively, must turn to third parties such as The Nature Conservancy to undertake certain management duties as the project developer's agent." According to Bontadelli, "in the few cases where we have implemented it to date, the application of Section 2081 has allowed us to guarantee better protection and conservation for the endangered species in question than we have historically been able to provide."

One disturbing aspect of DFG's implementation of section 2081 is that it is being done without the benefit of legally-required regulations which set forth specific criteria under which developers may be adjudged eligible for "management take" permits, and the enhancement/preservation/mitigation measures for which they must be responsible. In other words, DFG's failure to promulgate regulations under the Administrative Procedure Act "to implement, interpret, or make specific the law enforced or administered by it [section 2081], *or to govern its procedure*" (Government Code § 11342(b) (emphasis added)) is arguably "underground rulemaking."

34. Once FGC has designated a species as a "candidate" under section 2074.2(a)(2), DFG must make reasonable attempts "to notify affected and interested parties and to solicit data and comments on the petitioned action from as many persons as practicable." Fish and Game Code § 2074.4. Once this notice has been issued, candidate species are subject to the section 2080 taking prohibition pursuant to section 2085.

35. *Id.* at § 2090(b).

36. "Lead agency" and "project" are terms of art borrowed from CEQA, Public Resources Code § 21000 *et seq.* See Fish and Game Code §§ 2064-65.

37. *See* 14 CCR § 750 *et seq.*

38. Fish and Game Code § 2090(a).

39. *Id.* at § 2090(b). DFG's written finding and determination must be based upon "the best available scientific information." *Id.*

40. *Id.* at § 2092(c).

41. *Id.* at § 2091.

42. *Id.* at § 2092(a).

43. *Id.* at § 2092(b). This exception does not apply to projects which would likely result in the extinction of any endangered or threatened species. See id. at § 2092(b), 2092(c).

44. *Id.* at § 2092(b). This last requirement effectively asks the state lead agency to make a finding that it has acted in bad faith by expending significant resources on the project after commencement of the consultation process, in order to be able to argue that a change in plans would constitute a significant waste of money. The likelihood that any lead agency would make such a finding is nil.

45. Fish and Game Code § 2097 sets forth the duration of the Article 4 consultation requirements. As originally enacted in 1984, Article 4 was to sunset on July 1, 1990. In 1989, the legislature extended Article 4's duration until January 1, 1994 (Chapter 423, Statutes of 1989).

46. *1989 Annual Report, supra* note 2, at 4.

47. *Id.* Further, several informal, informational meetings took place regarding projects affecting listed species. These meetings allowed the Department to resolve potential problems before formal consultations became necessary. Telephone Interview with Paul Kelly, California Endangered Species Act Coordinator, DFG's Natural Heritage Division (Apr. 6, 1990); *see also 1989 Annual Report, supra* note 2, at 4.

48. Fish and Game Code § 2052.

49. Department of Fish and Game, *1988 Annual Report on the Status of California's Listed Threatened and Endangered Plants and Animals* (March 1989) at 22 (hereinafter "*1988 Annual Report*").

50. *See* California Nature Conservancy, *Sliding Toward Extinction: The State of California's Natural Heritage* (November 1987) at 33-34 (hereinafter referred to as *"Sliding Toward Extinction"*).

51. *1989 Annual Report, supra* note 2, at ii.

52. *See* **California Regulatory Law Reporter** (hereinafter "**CRLR**") Vol. 9, No. 3 (Summer 1989) at 109; Vol. 7, No. 4 (Fall 1987) at 94; Vol. 7, No. 3 (Summer 1987) at 119; and Vol. 6, No. 4 (Fall 1986) at 78-79.

53. *1989 Annual Report, supra* note 2, at ii.

54. Bowman, *Open Season on Wildlife Panel*, Sacramento Bee, Dec. 31, 1989, at A1, A18. A recent example of this dangerous predilection was the long-awaited listing of the Sacramento River winter-run king salmon. After several years of rejecting petitions to list the fish, whose population once numbered 60,000-120,000 in the 1960s, FGC decided on April 27, 1989, to reconsider the matter after being presented with evidence that only 2,085 of the fish remained. By its very next meeting (May 16, 1989), FGC was informed that only 600 salmon then remained, and finally decided to list the fish as endangered. *See* **CRLR** Vol. 9, No. 3 (Summer 1989) at 108; and Vol. 7, No. 4 (Fall 1987) at 94.

55. *1989 Annual Report, supra* note 2, at ii (emphasis added).

56. *Id.*

57. *Id.* at 11.

58. *Id. See also Sliding Toward Extinction, supra* note 50, at 15-16.

59. Fellmeth, *A Theory of Regulation: A Platform for State Regulatory Reform*, **CRLR** Vol. 5, No. 2 (Spring 1985) 1, 10-15.

60. This computation allows FGC ten days to preliminarily evaluate the petition and turn it over to DFG; DFG ninety days to evaluate the petition and make a recommendation to FGC; FGC thirty days in which to hold a meeting and approve "candidate" status; 365 days for DFG to fully evaluate the petition; another thirty days until FGC's next meeting, at which the "final consideration" vote is taken; fourteen days for FGC staff to prepare and file the notice of proposed rulemaking; 45 days for a public comment period and a public hearing; 30 days for FGC's preparation of the rulemaking file for submission to the Office of Administrative Law; and 30 days for OAL review and approval. FGC has not always been prompt in its decisionmaking on petitions for listing; *see, e.g.*, discussion of desert tortoise, *infra* at text accompanying notes 130-42.

61. The performance of OAL, as adjudged by regulatory agencies themselves, has been extensively critiqued in this publication. *See* **CRLR** Vol. 8, No. 4 (Fall 1988) at 8; *see also* Vol. 5, No. 1 (Winter 1985) at 3; Vol. 3, No. 2 (Spring 1984) at 14; Vol. 3, No. 1 (Winter 1983) at 13; and Vol. 1, No. 1 (Spring 1981) at 2.

62. Telephone interview with Paul Kelly, California Endangered Species Act Coordinator, DFG's Natural Heritage Division (May 2, 1990).

63. Fish and Game Code §§ 2074.4, 2090.

64. *Id.* at § 2071.5.

65. 14 CCR § 670.1(b).

66. Compare Fish and Game Code § 2062 (*see supra* text at note 9) with 14 CCR § 670.1(b) (*see supra* text at note 65).

67. Sacramento Bee, Dec. 31, 1989, A18, col. 1.

68. Code of Civil Procedure § 1094.5(c); *see also* Fellmeth and Folsom, **California Regulatory Law and Practice** at 126 (1981).

69. Code of Civil Procedure § 1094.5(c).

70. *But see supra* note 7.

71. As noted above, even a state lead agency is permitted to approve projects where jeopardy to a listed species is found, if it requires mitigation and enhancement measures which will "minimize the adverse impacts of the project" upon the listed species; and it finds that the proposed project is more beneficial than the project as compromised by alternatives suggested by DFG, and that it has not made an irretrievable commitment of resources to the project after DFG consultation has commenced. Fish and Game Code § 2092.

72. Telephone interview with Richard Spotts, California representative of Defenders of Wildlife (Oct. 11, 1989).

73. The Fourth District Court of Appeal currently has before it an appeal of the decision in *City of El Cajon v. State of California*, No. EC-002333, in which the City unsuccessfully attempted to halt aerial malathion spraying by the California Department of Food and Agriculture (CDFA). One of the causes of action alleged by the City is CDFA's failure to comply with CESA's consultation requirement. *See infra* text accompanying notes 119-29.

74. *See supra* note 73.

75. Fish and Game Code § 2090.

76. *See supra* note 44 and accompanying text.

77. Telephone interview with Paul Kelly, California Endangered Species Act Coordinator, DFG's Natural Heritage Division (Apr. 6, 1990).

78. Government Code § 87100.

79. Sacramento Bee, Dec. 31, 1989, A18, columns 2, 3. A bill currently pending in the legislature, ACA 51 (Campbell) would buttress Government Code § 87100 by expressly prohibiting any FGC commissioner from participating in any decision in which the member has a personal financial interest.

80. Commission on California State Government Organization and Economy, *Report on California's Fish*

and Game Commission and Department of Fish and Game (January 1990) (hereinafter referred to as "LHC Report"). For a comprehensive summary of this report, *see* **CRLR** Vol. 10, No. 1 (Winter 1990) at 38-41.

81. Fish and Game Code §§ 400-700.

82. California Department of Fish and Game, *A Message From the Director—Preserving Wildlife for Everyone* (Dec. 1979).

83. Fish and Game Code § 701.

84. California Constitution, Article IV, § 20.

85. Fish and Game Code § 206.

86. Government Code § 11120 *et seq.*

87. *Id.* at § 11340 *et seq.*

88. LHC Report, *supra* note 80, at 5.

89. Fish and Game Code § 200 *et seq.*

90. Public Resources Code § 21000.

91. *Id.* at § 21001.

92. 14 CCR § 15386 (Resources Agency's Guidelines for Implementation of the California Environmental Quality Act). In its role as a trustee agency under CEQA, DFG's Environmental Services Division reviews thousands of CEQA-required environmental impact reports annually. *1989 Annual Report*, supra note 2, at 4.

93. LHC Report, *supra* note 80, at 2. To resolve this problem, the Commission recommended that a special Resources Agency task force be convened to develop criteria for FGC membership, and suggested that FGC include a balance of biologists, environmentalists, developers, ranchers, and sportspersons.

94. *Id.* at 20-21. The Hoover report suggested the formation of a special Resources Agency Oversight Task Force, composed of one executive member from each of the major resource-related Resources Agency commissions and departments. This Task Force would attempt to unify policy and practice with respect to all significant aspects of California's fish and game, water, and habitat-related issues.

95. *Id.* at 29.

96. *Id.* at 21-23. As examples of FGC's poor performance in this area, the Little Hoover Commission pointed specifically to FGC's ill-informed decisions to approve hunting seasons for the mountain lion and the black bear, and its long-overdue decision to list the winter-run king salmon as endangered. *Id.; see also* **CRLR** Vol. 10, No. 1 (Winter 1990) at 138-39; Vol. 9, No. 4 (Fall 1989) at 119; and Vol. 9, No. 3 (Summer 1989) at 111.

Rather than recommending abolition of FGC, the Little Hoover Commission suggested that the proposed Resources Agency Oversight Task Force, *see supra* note 94, the legislature, and the Governor's office carefully assess FGC's performance in monitoring DFG, responding to public input, and making full use of scientific analyses prior to deciding issues before it.

97. LHC Report, *supra* note 80, at 5.

98. *Id.* at 7. These figures do not include money provided to DFG through Proposition 70, the California Wildlife, Coastal and Parkland Conservation Bond Act, which was passed by the electorate at the June 1988 election. The initiative allocates $131 million per year for specified environmental programs, some of which are administered by DFG. They also do not include monies generated from Proposition 99, the tobacco tax increase initiative approved by the electorate in November 1988. Proposition 99 was expected to generate over $42 million for various resources programs in 1989-90, 50% of which was allocated to wildlife habitat programs. Office of the Legislative Analyst, *The 1990-91 Budget: Perspectives and Issues* (Feb. 1990) at 312, 315.

99. Office of the Legislative Analyst, *Analysis of the 1990-91 Budget Bill* (Feb. 21, 1990) at 378. In 1990-91, DFG's Natural Heritage Division, one of whose functions is to implement CESA, would receive approximately $5 million from the Environmental License Plate Fund, $1.56 million from the Fish and Game Preservation Fund, $733,000 from the federal government, $1.2 million from Proposition 99 monies, $331,000 from the state's general fund, and $101,000 in reimbursements. Telephone interview with Gary Fujii, DFG Associate Budget Analyst (May 17, 1990).

100. *See infra* text accompanying notes 110-16.

101. LHC Report, *supra* note 80, at 25. Despite this low level of funding in relation to the scope of the job and the size of the state, DFG points out that "California spends five times more on nongame and endangered species than the next closest state and commits a greater portion of its total budget to these resources than all other states except one." *1989 Annual Report, supra* note 2, at 12.

102. LHC Report, *supra* note 80, at 25.

103. Fish and Game Code § 711(a).

104. Testimony of Richard Spotts, California Representative for the Defenders of Wildlife, to the Little Hoover Commission (June 27, 1989) at 7.

105. Van Vleck, *The Report of the Resources Agency Task Force on the Budget and Fiscal Procedures of the Department of Fish and Game* (Aug. 15, 1989) at 8. The special task force was established in April 1989 to respond to harsh legislative criticism of DFG's financial management and budget development processes. *See id.* at 5.

106. *Id.*

107. *Id.* at 23.

108. Office of the Legislative Analyst, *Analysis of the 1990-91 Budget Bill* (Feb. 21, 1990) at 322. In its report, the Little Hoover Commission noted that "the Department has been nearly wholly unable to satisfy Legislative informational requests." However, LHC also acknowledged:

> As noted by the Task Force report and the DFG's most vocal critics, the Department's fiscal accounting environment is not a happy one. There exist 21 "categorical" or dedicated accounts against which the DFG must charge portions of many employees' time, and for which there must be separate accounting. By consensus opinion, this represents one of the State's most complex bookkeeping systems.

LHC Report, *supra* note 80, at 32.

In its analysis of the 1990-91 budget, the Legislative Analyst noted that DFG, under orders from the legislature to provide budget, fiscal, and accounting training to key staff, "has made a concerted effort to provide training to staff, to document its proposals more fully, and to respond to the various recommendations made by the Resources Agency Task Force." However, despite this apparent progress, the Analyst notes that DFG's expenditure plan for 1989-90 and proposed budget for 1990-91 would "put the Fish and Game Preservation Fund in the red" to the tune of $9.5 million for those fiscal years.

109. LHC Report, *supra* note 80, at 33. The Little Hoover Commission urged the Resources Agency to press for more resources for DFG, "with special emphasis on adequate provision of services to the Department's Environmental Services Division." *Id.* at 37.

110. *1989 Annual Report*, supra note 2, at 1. The "rare" designation is accorded only to plants, pursuant to CESA's predecessor statute, the Native Plant Protection Act.

111. *Id.* at 2. *See also* California Nature Conservancy, *California Extinction Index* (1989).

112. Telephone interview with Paul Kelly, California Endangered Species Act Coordinator, DFG's Natural Heritage Division (Apr. 6, 1990).

113. *1988 Annual Report, supra* note 49, at 3.

114. The four animal species listed in 1989 are the desert tortoise, the bank swallow, the winter-run chinook salmon, and the Tipton kangaroo rat. *1989 Annual Report, supra* note 2, at ii. DFG had recommended the listing of all 25 petitioned plants, but FGC rejected three. *Id.*

115. *See supra* text accompanying note 79.

116. *1989 Annual Report, supra* note 2, at 7.

117. Telephone interview with Ron Pelzman, FGC Regulations Coordinator (Oct. 12, 1989).

118. *Sliding Toward Extinction, supra* note 50, at 80.

119. 14 CCR § 15386 (Resources Agency's Guidelines for Implementation of the California Environmental Quality Act).

120. *See infra* agency report on CDFA in this issue of **CRLR**; *see also* **CRLR** Vol. 10, No. 1 (Winter 1990) at 118-19.

121. *City of El Cajon v. State of California*, No. EC-002333 (petition filed May 18, 1990). El Cajon also charged that CDFA failed to provide an adequate written decision as required by Food and Agricultural Code § 5051 *et seq.*; that aerial malathion spraying is an actionable nuisance within the meaning of Civil Code § 3479 *et seq.*; and that CDFA violated CEQA due to its failure to establish that the Mexfly infestation is an "emergency" as defined in Public Resources Code § 21060.3.

122. Telephone interview with Kent Smith (DFG Sacramento) (May 14 and May 21, 1990) ("as far as we can tell, there has not been a formal or informal consultation. There was not a formal consult. There may have been an informal discussion, but there was no follow-up [by CDFA] as far as I know"); telephone interview with John Gustafson, DFG's biologist in charge of the Least Bell's Vireo (DFG Sacramento) (May 14, 1990); telephone interview with Jack Spruill (DFG Long Beach) (May 14, 1990); telephone interview with Mike Giusti and Krishan Lal (DFG Long Beach) (May 21, 1990).

123. Telephone interview with Mike Giusti and Krishan Lal (DFG Long Beach) (May 21, 1990).

124. *Id.*

125. Telephone interview with Paul Kelly, California Endangered Species Act Coordinator, DFG's Natural Heritage Division (May 16, 1990).

126. Telephone interview with Kent Smith (DFG Sacramento) (May 14, 1990); telephone interview with John Gustafson, DFG's biologist in charge of the Least Bell's Vireo (DFG Sacramento) (May 16, 1990).

127. *City of El Cajon v. State of California*, No. EC-002333 (Memorandum of Decision) (June 4, 1990).

128. On June 4, 1990 (the same day the decision was issued), the City filed a notice of appeal and a motion for stay pending appeal, in an attempt to stop aerial spraying scheduled for that same evening. The motion for stay pending appeal was denied in a 2-1, one-sentence decision by the Fourth District Court of Appeal. At this writing, El Cajon's appeal of the lower court decision is still pending.

129. Fish and Game Code § 2090. In the *El Cajon* case, CDFA produced no written finding by DFG pursuant to this section.

130. Testimony of Richard Spotts, California Representative for Defenders of Wildlife, to the Little Hoover Commission (June 27, 1989) at 6. Mr. Spotts also noted, "This is not only because the Deukmejian Administration gives the benefit of any doubt to commercial interests, but also because commercial interests give considerably more campaign donations than conservationists." *Id.*

131. *See* **CRLR** Vol. 9, No. 4 (Fall 1989) at 117-18; Vol. 9, No. 3 (Summer 1989) at 108; Vol. 9, No. 2 (Spring 1989) at 102- 03; and Vol. 9, No. 1 (Winter 1989) at 91.

132. Los Angeles Times, Jun. 23, 1989, at I-3; *see also* **CRLR** Vol. 9, No. 4 (Fall 1989) at 117-18.

133. Los Angeles Times, Feb. 19, 1989, at V-4, Col. 6; Los Angeles Times, Jan. 26, 1988, at I-3, col. 2.

134. *Id.*

135. Telephone interview with Robert Treanor, FGC Assistant Executive Secretary (May 8, 1990); *see also* Assembly Committee on Water, Parks and Wildlife, Committee Analysis of SB 999 (McCorquodale) (May 30, 1989).

136. 14 CCR § 670.5.

137. Los Angeles Times, Feb. 3, 1989, at I-29, col. 1.

138. Los Angeles Times, Jan. 26, 1988, at I-3, col. 2.

139. Los Angeles Times, Feb. 3, 1989, at I-29, col. 1; telephone interview with Kristin Berry (Mar. 2, 1989).

140. **CRLR** Vol. 9, No. 2 (Spring 1989) at 102-03. When tortoise proponents returned at FGC's April 1989 meeting and urged it to reconsider its delay decision and list the tortoise immediately, FGC again refused. **CRLR** Vol. 9, No. 3 (Summer 1989) at 108.

141. *See, e.g.*, Testimony of Richard Spotts, California Representative for the Defenders of Wildlife, to the Little Hoover Commission (June 27, 1989) at 5-6 ("...the FGC is increasingly seen as an *impediment* to wildlife conservation. In other words, they have become part of the problem rather than the solution....The FGC seems to spend inordinate time on relatively mundane matters, alienates many of its potential constituencies, exhibits management philosophies shared by a shrinking minority of Californians, and is nearly invisible at the State Capitol on crucial legislative and budget issues") (emphasis original).

142. Shortly after FGC listed the desert tortoise, three environmental groups (Natural Resources Defense Council, Environmental Defense Fund, and Defenders of Wildlife) sued the U.S. Department of the Interior to compel it to list the tortoise as endangered under the federal act. On July 24, 1989—six days after the lawsuit was filed, Interior Secretary Manuel Lujan agreed to adopt an emergency regulation listing the western Mojave desert tortoise population as endangered.

143. SB 999 was subsequently amended to delete the provision precluding OAL review.

144. Assembly Committee on Water, Parks and Wildlife, Committee Analysis of SB 999 (McCorquodale) (May 30, 1989).

145. Telephone interview with Richard Spotts, California representative for Defenders of Wildlife (Oct. 11, 1989).

146. Governor's Veto Message on SB 999 (McCorquodale) (Sept. 26, 1989).

147. *California Regulatory Notice Register* (Feb. 17, 1989) at 308; *see also* **CRLR** Vol. 9, No. 3 (Summer 1989) at 108. As noted, FGC listing is already wholly discretionary. Neither CESA nor the regulations adopted by FGC to implement CESA meaningfully mandate FGC to list a species under any circumstances. *See supra* text accompanying notes 63-69.

148. *California Regulatory Notice Register* (May 5, 1989) at 1246; *id.* (May 12, 1989) at 1355.

Recovery plans have recently been the subject of controversy at FGC meetings. To the extent CESA addresses recovery plans, it requires DFG to suggest "management activities and other recommendations for recovery of the [listed] species." Fish and Game Code § 2077(a). Thus, FGC's originally proposed rulemaking to require DFG to prepare recovery plans for listed species would appear to be superfluous. However, FGC Commissioner Albert Taucher recently attempted to require *petitioners* to prepare and present recov-

ery plans as a condition precedent to the Commission's consideration of their petitions for listing. Commissioner Everett McCracken questioned FGC's authority to impose such a requirement; Commission Executive Secretary Harold Cribbs opined that a recovery plan requirement is not authorized. *See* **CRLR** Vol. 10, No. 1 (Winter 1990) at 139.

149. *See* **CRLR** Vol. 9, No. 4 (Fall 1989) at 118.

150. Fish and Game Code § 3005.7 (repealed by its own terms January 1, 1986). Several legislative attempts to extend the statute, including SB 76 (Presley) and AB 476 (Bates), failed. *See* **CRLR** Vol. 7, No. 2 (Spring 1987) at 92-94.

151. In 1987, FGC approved the first mountain lion hunt in sixteen years. Neither that hunt nor a similar hunt approved by the Commission in 1988 have ever occurred. Both were declared unlawful by San Francisco Superior Court Judge Lucy Kelly McCabe, on grounds that DFG's environmental impact reports required under CEQA were legally insufficient. These rulings were recently upheld by the First District Court of Appeal, which called DFG's EIRs "woefully inadequate." *Mountain Lion Coalition v. California Fish and Game Commission, et al.*, 214 Cal. App. 3d 1043 (1st Dist., Oct. 17, 1989); *see* **CRLR** Vol. 10, No. 1 (Winter 1990) at 138-39 for complete summary of this case.

152. Telephone interview of Paul Kelly, California Endangered Species Act Coordinator, DFG's Natural Heritage Division (Apr. 6, 1990). At least two courts would question the sufficiency and validity of DFG's data on the mountain lion population. *See Mountain Lion Coalition v. California Fish and Game Commission, supra* note 151.

153. Telephone interview with Sharon Negri, representative of the Mountain Lion Preservation Foundation (Oct. 11, 1989).

154. In its enactment of AB 939 (Sher) (Chapter 1095, Statutes of 1989), the legislature recently demonstrated its willingness to abolish a board with a biased membership and an outdated focus. AB 939 abolished the California Waste Management Board (CWMB), which—like FGC—was composed of five part-time commissioners appointed by the Governor. Because its enabling statute contained no criteria for membership on the board, CWMB became dominated by members of the trash hauling industry; thus, in its formulation of state policy regarding solid waste management, the Board naturally favored landfill creation and expansion, and virtually ignored recycling, source reduction, and waste-to-energy technology.

AB 939 wiped out CWMB and replaced it with the California Integrated Waste Management and Recycling Board, to be composed of six full-time members variously appointed by the Governor, Senate, and Assembly. The legislature also instilled the new board with a mandated focus on recycling, source reduction, waste-to-energy technology, and other methods of resolving the state's solid waste crisis long ignored by CWMB. *See* **CRLR** Vol. 10, No. 1 (Winter 1990) at 129-30; and Vol. 9, No. 4 (Fall 1989) at 110-11 for further information on AB 939 (Sher).